BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

EMANUEL NYSTAZOS Claimant	)	
VS.	)	
VHP ENTERPRISES, INC. Respondent	)	Docket No. 1,018,221
AND	)	
COMMERCE & INDUSTRY INS. CO. Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the September 1, 2004 preliminary hearing Order entered by Administrative Law Judge (ALJ) Steven J. Howard.

ISSUES

Following the August 31, 2004, preliminary hearing, Judge Howard awarded claimant preliminary hearing benefits including reimbursement for medical mileage and medical treatment. Specifically, respondent and its insurance carrier were ordered "to provide [an] orthopedic specialist to treat claimant's hip in [the] New York area. Respondent/Insurance carrier [are] to provide [a] physician to provide and monitor sleep and/or anti-depressant drugs, if requested, by claimant in the New York area."[1]

Respondent and its insurance carrier (respondent) argue that "ALJ Howard exceeded his jurisdiction in awarding medical mileage in association with a preliminary hearing" and that in doing so, "this action renders the preliminary order void."[2] Respondent further contends that Judge Howard erred in awarding medical treatment for claimant's hip

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[1] Order (Aug. 31, 2004).

[2] Application of Respondent and Insurance Carrier for Review Before the Workers Compensation Appeals Board and Docketing Statement (filed Sept. 16, 2004).

because "claimant's hip problems preexisted the accident, and were not the product of an accidental injury that arose out of and in the course of [his] employment on April 22, 2003."[3] Finally, respondent argues Judge Howard "erred in awarding medical treatment . . . for psychiatric problems, in light of the evidence establishing that the claimant did not sustain a psychiatric injury that arose out of and in the course of employment on April 22, 2003."[4]

Conversely, claimant contends that the ALJ's Order should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions on which that right depends.[5] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[6]

An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment.[7] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[8]

On April 22, 2003, claimant was working for respondent sandblasting and spray painting the underside of a bridge when he fell approximately 25 feet and landed on concrete. Respondent admits claimant suffered accidental injury arising out and in the course of his employment.[9]

As a result of his fall, claimant suffered multiple injuries including a fracture to his right hip. Surgery was performed for that fracture including the placement of a plate and

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[3] Respondent's Brief at 1 (filed Oct. 12, 2004).

[4] *Id.* at 2.

[5] K.S.A. 44-501(a); *See also Chandler v. Central Oil Corp.,* 253 Kan. 50, 853 P.2d 649 (1993); *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 689 P.2d 871 (1984).

[6] K.S.A. 44-508(g); *See also in re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[7] *Brobst v. Brighton Place North*, 24 Kan. App. 2d 766, 771, 955 P.2d 1315 (1997).

[8] *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

[9] P.H. Trans. at 4.

screws. However, claimant continues to have problems with pain and discomfort in the area of his hip. Hip replacement surgery has been recommended. Respondent contends that the need for hip replacement surgery is not due to the accident but is instead due to a preexisting condition. Claimant denies having problems with his right hip or leg before this accident. However, the medical evidence indicates that claimant's avascular necrosis (osteonecrosis) condition may have preexisted this injury. Nevertheless, the medical evidence clearly establishes that the work-related injury aggravated the preexisting condition and accelerated the need for a hip replacement.

It is well settled in this State that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.[10] "The test is not whether the job related activity or injury caused the condition but whether the job related activity or injury aggravated or accelerated the condition."[11]

At the time of the preliminary hearing claimant was living in New York City. Accordingly, claimant asked that his medical treatment be provided in the area where he now resides. The Appeals Board finds that the ALJ's order for respondent to provide an orthopedic specialist to treat claimant's hip in the New York area, should be affirmed.

Claimant testified that after his accident he began having nightmares. These "scary dreams"[12] cause him to wake up and deprive him of sleep. Claimant denies having this problem before his accident. Claimant asked the court for psychological or psychiatric care to help him with his sleep disturbances and nightmares. Again, the greater weight of the credible evidence is that claimant's nightmares and sleep problems are directly related to his accident. Accordingly, the Board affirms the ALJ's order that respondent "provide [a] physician to provide and monitor [claimant's] sleep and/or anti-depressant drugs, if requested, by claimant in the New York area."[13]

Finally, the ALJ did not exceed his jurisdiction in ordering respondent to reimburse claimant for mileage he incurred traveling to authorized medical treatment. That is part of a judge's jurisdiction and authority at a preliminary hearing.[14]

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[10] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976); *Harris v. Cessna Aircraft Co.,* 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

[11] *Hanson v. Logan U.S.D. 326,* 28 Kan. App. 2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001).

[12] P.H. Trans. at 11.

[13] Order (Sept. 1, 2004).

[14] K.S.A. 44-534a; K.S.A. 44-510h(a); K.A.R. 51-9-11.

WHEREFORE, it is the finding, decision and order of the Board that the Order entered by Administrative Law Judge Steven J. Howard dated September 1, 2004, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February 2005.

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BOARD MEMBER

c: Peter A. Jouras, Jr., Attorney for Claimant
William G. Belden, Attorney for Respondent and Commerce & Industry Ins. Co.
Steven J. Howard, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director